

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96514; File No. SR-NYSE-2022-14)

December 15, 2022

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Modify Certain Pricing Limitations for Securities Listed on the Exchange Pursuant to a Primary Direct Floor Listing

I. Introduction

On April 7, 2022, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to modify certain pricing limitations for securities listed on the Exchange pursuant to a direct listing in which the company will sell shares itself in the opening auction on the first day of trading on the Exchange. The proposed rule change was published for comment in the Federal Register on April 19, 2022.³

On May 26, 2022, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 94708 (Apr. 13, 2022), 87 FR 23300 (Apr. 19, 2022). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nyse-2022-14/srnyse202214.htm>. The comments expressed by one commenter are not relevant to the proposed rule change. See Letter from Andrew Robison (Apr. 22, 2022).

⁴ 15 U.S.C. 78s(b)(2).

proposed rule change.⁵ On July 18, 2022, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On October 11, 2022, the Commission extended the time period for approving or disapproving the proposal to December 15, 2022.⁸

On November 8, 2022, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the original filing in its entirety.⁹ The proposed rule change, as modified by Amendment No. 2, was published for comment in the Federal Register on November 15, 2022.¹⁰ The Commission is approving the proposed rule change, as modified by Amendment No. 2.

⁵ See Securities Exchange Act Release No. 94991 (May 26, 2022), 87 FR 33518 (June 2, 2022). The Commission designated July 18, 2022, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 95312 (July 18, 2022), 87 FR 43914 (July 22, 2022) (“OIP”).

⁸ See Securities Exchange Act Release No. 96023 (Oct. 11, 2022), 87 FR 62902 (Oct. 17, 2022).

⁹ On November 4, 2022, the Exchange filed Amendment No. 1 to the proposed rule change. Amendment No. 1 was withdrawn on November 8, 2022. Amendment No. 2 to the proposed rule change revised the proposal: (i) to require the retention of an underwriter with respect to the primary sales of shares by the company and identification of the underwriter in the company’s effective registration statement; (ii) to clarify that the 20% and 80% thresholds used in determining the Primary Direct Floor Listing Auction Price Range will be calculated based on the highest price of the Issuer Price Range; (iii) to require that the Auction Price cannot be above the price that is 80% above the highest price of the Issuer Price Range; (iv) to require that if the issuer certifies to the Exchange a maximum Auction Price that is below the price that is 80% above the highest price of the Issuer Price Range, the Auction Price may not be above such price; and (v) to make other clarifying changes.

¹⁰ See Securities Exchange Act Release No. (Nov. 8, 2022), 87 FR 68558 (Nov. 15, 2022) (“Notice”).

II. Description of the Proposal, as Modified by Amendment No. 2

Section 102.01B, Footnote (E) of the of the Listed Company Manual (the “Manual”) provides that, in certain cases, a company that has not previously had its common equity securities registered under the Exchange Act may wish to list its common equity securities on the Exchange at the time of effectiveness of a registration statement¹¹ pursuant to which the company will sell shares itself in the opening auction on the first day of trading on the Exchange (a “Primary Direct Floor Listing”).¹² In the Exchange’s prior approved proposal to initially allow for a Primary Direct Floor Listing, the Exchange also adopted Rule 7.31(c)(1)(D) defining an Issuer Direct Offering Order (“IDO Order”)¹³ for use by a company that wishes to sell its shares through a Primary Direct Floor Listing. In addition, the Exchange modified Rule 7.35A to describe how the IDO Order would participate in a Direct Listing Auction, establish additional

¹¹ The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 (“Securities Act”).

¹² A Primary Direct Floor Listing includes listings where either: (i) only the company itself is selling shares in the opening auction on the first day of trading; or (ii) the company is selling shares and selling shareholders may also sell shares in such opening auction. See Section 102.01B, Footnote (E) of the Manual. See also Securities Exchange Act Release No. 90768 (Dec. 22, 2020), 85 FR 85807 (Dec. 29, 2020) (SR-NYSE-2019-67) (Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Chapter One of the Listed Company Manual to Modify the Provisions Relating to Direct Listings) (“Approval Order”).

¹³ See Approval Order, supra note 12, 85 FR at 85813. An IDO Order is a Limit Order to sell that is to be traded only in a Direct Listing Auction. See Rule 7.31(c)(1)(D). See also Rule 7.31(a)(2) for the definition of “Limit Order,” Rule 7.35(a)(1) for the definition of “Auction,” and Rule 7.35(a)(1)(E) for the definition of “Direct Listing Auction.” The IDO Order has the following requirements: (i) only one IDO Order may be entered on behalf of the issuer and only by one member organization; (ii) the limit price of the IDO Order must be equal to the lowest price of the price range established by the issuer in its effective registration statement; (iii) the IDO Order must be for the quantity of shares offered by the issuer, as disclosed in the prospectus in the effective registration statement; (iv) an IDO Order may not be cancelled or modified; and (v) an IDO Order must be executed in full in the Direct Listing Auction. See Rule 7.31(c)(1)(D)(i)-(v).

requirements for a Designated Market Maker (“DMM”) when conducting a Direct Listing Auction for a Primary Direct Floor Listing, and specify how the Indication Reference Price would be determined for a security to be opened in a Direct Listing.¹⁴ Currently, under Rule 7.35A(g)(2), the DMM will not conduct a Direct Listing Auction for a Primary Direct Floor Listing if (i) the Auction Price¹⁵ would be outside of the price range specified by the company in its effective registration statement (the “Price Range Limitation”)¹⁶ or (ii) there is insufficient interest to satisfy both the IDO Order and all better-priced sell orders in full.¹⁷

The Exchange proposes to modify the Price Range Limitation to provide that a Direct Listing Auction for a Primary Direct Floor Listing may be conducted if the Auction Price determined by the DMM is outside of the Issuer Price Range (i.e., the price range established by the issuer in its effective registration statement), but only if the Auction Price is (1) at or above

¹⁴ See Approval Order, supra note 12, 85 FR at 85813. See also Notice, supra note 10, 87 FR at 68563. See Rule 7.35A(d)(2)(A)(v) for a description about how the “Indication Reference Price” is determined for a security that is a Primary Direct Floor Listing.

¹⁵ The Exchange defines Auction Price in Rule 7.35(a)(6) as the price at which an Auction is conducted. In addition, Rule 7.35A sets forth requirements relating to the determination of the Auction Price by the DMM. For purposes of the proposal, “Auction Price” refers to the price at which trading would commence in a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing. See Notice, supra note 10, 87 FR at 68559 n.13.

¹⁶ The Exchange states that references in the proposal to the price range established by the issuer in its effective registration statement are to the price range disclosed in the prospectus in such registration statement. See Notice, supra note 10, 87 FR at 68559 n.14. Currently, the Exchange defines the price range established by the issuer in its effective registration statement as the “Primary Direct Floor Listing Auction Price Range.” See Rule 7.31(c)(1)(D)(ii). As discussed further below, the Exchange proposes to redefine the price range established by the issuer in its effective registration statement as the “Issuer Price Range.” See proposed Rule 7.31(c)(1)(D)(ii). Throughout this order, we also refer to this “Issuer Price Range” as the “disclosed price range.”

¹⁷ See Notice, supra note 10, 87 FR at 68559.

the price that is 20% below the lowest price of the Issuer Price Range¹⁸ and (2) at or below the price that is 80% above the highest price of the Issuer Price Range (the “80% Upside Limit”).¹⁹ The Exchange proposes that a Direct Listing Auction for a Primary Direct Floor Listing could proceed in these circumstances at a price outside of the Issuer Price Range (whether lower or higher), provided that the issuer has specified the quantity of shares registered in its registration statement, as permitted by Securities Act Rule 457, and certified to the Exchange and publicly disclosed that: (i) it does not expect that the Auction Price would materially change the issuer’s previous disclosure in its effective registration statement; (ii) the price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K; and (iii) such registration statement contains a sensitivity analysis explaining how the issuer’s plans would change if the actual proceeds from the offering differ from the amount assumed in the disclosed price range.²⁰ In addition, if the issuer certifies to the Exchange an upper price limit that is below the 80% Upside Limit, the Exchange proposes that the Direct Listing Auction for a Primary Direct Floor Listing may not proceed if the Auction Price determined by the DMM exceeds the certified price limit. The Exchange also proposes to require that a company offering securities for sale in a Primary Direct

¹⁸ The Exchange proposes to define the “Primary Direct Floor Listing Auction Price Range” in Rule 7.31(c)(1)(D)(ii) as the price range that includes 20% below the lowest price and 80% above the highest price of the Issuer Price Range. See Notice, supra note 10, 87 FR at 68559.

¹⁹ As provided in proposed Rule 7.31(c)(1)(D)(ii), the Exchange proposes to calculate the 20% and 80% thresholds to determine the Primary Direct Floor Listing Auction Price Range based on the highest price of the Issuer Price Range. For example, if the Issuer Auction Price Range is \$28.00 to \$30.00, the Primary Direct Floor Listing Auction Price Range would be \$22.00 to \$54.00. See Notice, supra note 10, 87 FR at 68559.

²⁰ See Notice, supra note 10, 87 FR at 68559. See also proposed Rule 7.35A(g)(2)(B)(i).

Floor Listing must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement.²¹ In addition, the Exchange proposes to require that for the purposes of determining the Primary Direct Floor Listing Auction Price Range, the 20% and 80% thresholds will be calculated based on the highest price of the Issuer Price Range.²²

The Exchange states its belief that, while many companies are interested in alternatives to the traditional initial public offering (“IPO”), companies and their advisors may be reluctant to use the Primary Direct Floor Listing under current Exchange rules because of concerns about the Price Range Limitation.²³ The Exchange states it believes that “[t]he Price Range Limitation—which is imposed on a Primary Direct Floor Listing but not on an IPO—increases the probability of a failed offering because it contemplates there also being too much investor interest. In other words, if investor interest is greater than the company and its advisors anticipated, an offering would need to be delayed or cancelled.”²⁴

The Exchange states that, under current Exchange Rules, the DMM would not conduct a Direct Listing Auction for a security subject to a Primary Direct Floor Listing if the Auction Price determined is above the highest price of the price range established by the issuer in its effective registration statement.²⁵ The Exchange further states that, in this case, the offering would be cancelled or postponed until the company amends its effective registration statement,

²¹ See Notice, supra note 10, 87 FR at 68559.

²² See id. at 68563.

²³ See id. at 68559.

²⁴ Id.

²⁵ See id. at 68560.

and at a minimum, such a delay could expose the company to risks associated with changing investor sentiment in the event of an adverse market event.²⁶ The Exchange states its belief that, as a result, companies may be reluctant to use this alternative method of going public despite its expected potential benefits because of the restrictions of the Price Range Limitation.²⁷

The Exchange has proposed to modify the Price Range Limitation such that a Direct Listing Auction for a Primary Direct Floor Listing could proceed if the Auction Price is at or above the price that is 20% below the lowest price of the Issuer Price Range and at or below the 80% Upside Limit.²⁸ Therefore, the Exchange proposes that the DMM could conduct the Direct Listing Auction even if the Auction Price is outside of the Issuer Price Range, provided all other necessary conditions are met, if the Auction Price would not be more than 20% below the lowest price or more than 80% above the highest price of the Issuer Price Range and the company has, in its effective registration statement, specified the quantity of shares registered, as permitted by Securities Act Rule 457.²⁹

The Exchange proposes that when the Auction Price is outside of the Issuer Price Range, but not more than 20% below such price range and higher than the 80% Upper Limit, the Direct Listing Auction would not proceed unless the company has previously certified to the Exchange and publicly disclosed that (i) the company does not expect that such offering price would materially change the company's previous disclosure in its effective registration statement; (ii) the price range in the preliminary prospectus included in the effective registration statement is a

²⁶ See id.

²⁷ See id.

²⁸ See id.

²⁹ See id.

bona fide price range in accordance with Item 501(b)(3) of Regulation S-K; and (iii) the company's registration statement contains a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering differ from the amount assumed in the disclosed price range.³⁰ In addition, if the company's certification submitted to the Exchange includes a price limit that is below the 80% Upper Limit, the Direct Listing Auction would not take place if the Auction Price is determined by the DMM to be above such limit.³¹

When the Auction Price is outside of the Issuer Price Range (whether it is lower or higher than such price range), the Exchange also proposes to provide the issuer with the opportunity to provide any necessary additional disclosures that are dependent on the price of the offering so that any such disclosures would be available to investors prior to the completion of the offering.³² The Exchange proposes that a Direct Listing Auction for a Primary Direct Floor Listing would only proceed outside the Issuer Price Range if the issuer also confirms to the Exchange that no additional disclosures are required under federal securities laws based on the Auction Price determined by the DMM.³³

The Exchange states its belief that the additional requirements to permit a Direct Listing Auction to take place at an Auction Price that is outside of the Issuer Price Range (whether it is lower or higher than such price range but within the Primary Direct Floor Listing Auction Price Range), as proposed, would provide sufficient disclosures to allow investors to evaluate whether to participate in the Direct Listing Auction for a Primary Direct Floor Listing, including the

³⁰ See id.

³¹ See id.

³² See id.

³³ See id. See proposed Rule 7.35A(g)(2)(B)(ii).

opportunity to see how changes in share price may impact the company's disclosures.³⁴

The Exchange states that it believes its proposal with respect to the Price Range Limitation for a Primary Direct Floor Listing can be analogized with Securities Act Rule 430A and staff guidance, which, according to the Exchange, generally allow a company to price a public offering 20% outside of the disclosed price range without regard to the materiality of the changes to the disclosure contained in the company's registration statement.³⁵ According to the Exchange, it believes that such guidance would also allow for deviation of greater than 20% above the highest price of the disclosed price range, provided that such change would not materially change the previous disclosure.³⁶ The Exchange states that, accordingly, it believes that a company listing in connection with a Primary Direct Floor Listing could specify the quantity of shares registered, as permitted by Securities Act Rule 457, and, if an Auction prices outside of the disclosed price range, use a Rule 424(b) prospectus, rather than a post-effective amendment, when either (i) the 20% threshold noted in Rule 430A is not exceeded, regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure

³⁴ See Notice, supra note 10, 87 FR at 68560.

³⁵ See id. According to the Exchange, Securities Act Rule 457 permits issuers to register securities either by specifying the quantity of shares registered, pursuant to Rule 457(a), or the proposed maximum aggregate offering amount. The Exchange proposes to require that companies selling shares through a Primary Direct Floor Listing will register securities by specifying the quantity of shares registered and not a maximum offering amount. See id. at 68560 n.20. The Exchange also states that the Exchange believes that the proposed modification of the Price Range Limitation would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest, because, according to the Exchange, this approach is similar to the pricing of an IPO where an issuer is permitted to price outside of the disclosed price range in accordance with the SEC Staff's guidance. See id. at 68564.

³⁶ See id. at 68560.

that would be contained in the Rule 424(b) prospectus, or (ii) there is a deviation above the price range beyond the 20% threshold noted in Rule 430A if such deviation would not materially change the previous disclosures, in each case assuming the number of shares issued is not increased from the number of shares disclosed in the prospectus.³⁷

The Exchange states that the burden of complying with the disclosures required under federal securities laws, including providing any disclosure necessary to avoid any material misstatements or omissions, remains with the issuer.³⁸ Under the proposal, therefore, the Direct Listing Auction for a Primary Direct Floor Listing would not take place outside of the Issuer Price Range until the issuer confirms to the Exchange that no additional disclosures are required under the federal securities laws based on the Auction Price determined by the DMM.³⁹

The Exchange states it believes that an underwriter plays an important role in a traditional IPO and, therefore, proposes to require that a company listing securities on the Exchange in connection with a Primary Direct Floor Listing must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement.⁴⁰ The Exchange believes that investor protection provisions are necessary in a

³⁷ See Notice, supra note 10, 87 FR at 68560. See supra note 20 and accompanying text.

³⁸ See id. According to the Exchange, the Commission previously stated that while Securities Act Rule 430A permits companies to omit specified price-related information from the prospectus included in the registration statement at the time of effectiveness, and later file the omitted information with the Commission as specified in the rule, it neither prohibits a company from conducting a registered offering at prices beyond those that would permit a company to provide pricing information through a Securities Act Rule 424(b) prospectus supplement nor absolves any company relying on the rule from any liability for potentially misleading disclosure under the federal securities laws. See id. at 68560-61 (citing Securities Exchange Act Release No. 93119 (Sept. 24, 2021), 86 FR 54262 (Sept. 30, 2021)).

³⁹ See Notice, supra note 10, 87 FR at 68561.

⁴⁰ See id.

Primary Direct Floor Listing if an offering can price outside of the disclosed price range, subject to the proposed limitations, because such provisions allow investors to make reasonable pricing decisions with clarity that the company’s underwriter would face statutory liability.⁴¹

The Exchange further states it believes that the requirement to retain a named underwriter mitigates concerns raised by the Commission in the OIP regarding the usefulness of price range disclosure provided to investors in a Securities Act registration statement filed in connection with a Primary Direct Floor Listing.⁴² The Exchange believes that an underwriter retained in connection with a Primary Direct Floor Listing would perform substantially similar functions, including those related to establishing and adjusting the price range, to those performed by an underwriter in a “typical” IPO because the underwriter would be subject to similar liability and reputational risk.⁴³

The Exchange also states it believes that the requirement to retain a named underwriter, as described above, may mitigate concerns raised by the Commission in the OIP regarding challenges to bringing claims under Section 11 of the Securities Act due to the potential assertion of tracing defenses because an underwriter may choose to impose lock-up arrangements.⁴⁴ The Exchange states that, as in a traditional firm commitment underwritten IPO, in which lock-up arrangements are often imposed, an underwriter in connection with a Primary Direct Floor Listing would be able to impose lock-up agreements for the same reasons that make lock-up

⁴¹ See id.

⁴² See id. at 68562.

⁴³ See id.

⁴⁴ See id. at 68561.

agreements common in an IPO.⁴⁵

The Exchange states that its proposal to require that the securities of a company listing in connection with a Primary Direct Floor Listing cannot price above the 80% Upper Limit further mitigates concerns regarding the usefulness of the price range disclosure provided to investors.⁴⁶ The Exchange states that the 80% Upper Limit would incentivize the company and its underwriter to set the disclosed price range to avoid the failed offering consequences and would also encourage an issuer to adjust the price range disclosed in their registration statement prior to effectiveness in response to pricing feedback received from market analysts and potential investors.⁴⁷

The Exchange states that given that, as proposed, there may be a Primary Direct Floor Listing that could price outside of the disclosed price range subject to the 80% Upper Limit above which the Direct Listing Auction could not proceed, the Exchange proposes “to support price discovery transparency by providing readily available, real time pricing information to investors.”⁴⁸ Specifically, the Exchange represents that the DMM’s pre-opening indications for a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing would continue to be published via the securities information processor (“SIP”) and proprietary data feeds.⁴⁹ The Exchange states that it would also make the Indication Reference Price available,

⁴⁵ See id. at 68561-62.

⁴⁶ See id. at 68562.

⁴⁷ See id.

⁴⁸ See id.

⁴⁹ See id. See also proposed Rule 7.35A(d)(2)(A)(v). The Exchange states that its dissemination of pre-opening indications for a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing via the SIP and proprietary data feeds is consistent with the availability of the same for securities opened in IPOs and believes that interested investors have found pre-opening indications to be readily accessible and to

free of charge, on a public website (such as www.nyse.com) on the day such auction is anticipated to take place.⁵⁰ The Exchange also proposes to require member organizations to provide to a customer, before that customer places an order to participate in a Direct Listing Auction for a Primary Direct Floor Listing, a notice describing the mechanics of pricing a security subject to a Direct Listing Auction for a Primary Direct Floor Listing, including information regarding the availability of pre-opening indications via the SIP and proprietary data feeds and the location of the public website where the Exchange would disseminate information relating to the Indication Reference Price.⁵¹

The Exchange further proposes to distribute, at least one business day prior to the commencement of trading of a security listing in connection with a Primary Direct Floor Listing, a regulatory bulletin that describes any special characteristics of the offering and the Exchange rules that apply to the pricing of a Primary Direct Floor Listing.⁵² The Exchange states that the regulatory bulletin would also include information about the notice that member organizations would be required to provide customers, as proposed, and remind member organizations of their obligations pursuant to the Exchange rules that (1) require member organizations to use reasonable diligence in regard to the opening and maintenance of every account, to know (and

provide useful real time pricing information to inform their participation in such auctions. The Exchange thus believes that its proposal addresses the concerns raised in the OIP regarding the sufficiency of price discovery transparency for investors. See Notice, supra note 10, 87 FR at 68562 n.29.

⁵⁰ See Notice, supra note 10, 87 FR at 68562. The Indication Reference Price for a security that is a Primary Direct Floor Listing is the lowest price of the Primary Direct Floor Listing Auction Price Range. This price would be known before the opening process begins and would not change once established.

⁵¹ See id. See also proposed Rule 7.35A, Commentary .20(3).

⁵² See Notice, supra note 10, 87 FR at 68562. See also proposed Rule 7.35A, Commentary .20.

retain) the essential facts concerning every customer and concerning the authority of each person acting on behalf of such customer (Rule 2090); and (2) require member organizations in recommending transactions for a security subject to a Direct Listing Auction for a Primary Direct Floor Listing to have a reasonable basis to believe that: (i) the recommendation is suitable for a customer given reasonable inquiry concerning the customer’s investment objectives, financial situation, needs, and any other information known by such member organizations, and (ii) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in such security (Rule 2111).⁵³ The Exchange states that these member organization requirements are intended to remind members of their obligations to “know their customers” and would also serve to increase transparency regarding the pricing mechanisms applicable to a Primary Direct Floor Listing and help provide investors with sufficient price discovery information.⁵⁴ The Exchange represents that, for each Primary Direct Floor Listing, the Exchange’s regulatory bulletin would also inform market participants that the Auction Price could be up to 20% below the lowest price of the disclosed price range and would specify that price.⁵⁵ The Exchange also represents that this regulatory bulletin would indicate the price above which the Direct Listing Auction for the Primary Direct Floor Listing could not proceed, based on the company’s certification.⁵⁶

The Exchange also proposes to amend certain aspects of the Manual. Specifically, Section 102.01B, Footnote (E) of the Manual currently provides that, with respect to a Primary

⁵³ See Notice, supra note 10, 87 FR at 68562. See also proposed Rule 7.35A, Commentary .20(1) and (2).

⁵⁴ See Notice, supra note 10, 87 FR at 68562.

⁵⁵ See id.

⁵⁶ See id.

Direct Floor Listing, the Exchange will deem a company to have met the applicable aggregate market value of publicly-held shares requirement⁵⁷ if the company will sell at least \$100,000,000 in market value of shares in the Exchange's opening auction on the first day of trading on the Exchange. The Manual further provides that, where a company is conducting a Primary Direct Floor Listing and will sell shares in the opening auction with a market value of less than \$100,000,000, the Exchange will determine that such company has met its market-value of publicly-held shares requirement if the aggregate market value of the shares the company will sell in the opening auction on the first day of trading and the shares that are publicly held immediately prior to the listing is at least \$250,000,000 with such market value calculated using a price per share equal to the lowest price of the disclosed price range.⁵⁸

The Exchange states that, to effect the changes to the Price Range Limitation and facilitate the possibility of a Direct Listing Auction for a Primary Direct Floor Listing pricing up to 20% below the disclosed price range, the Exchange proposes to modify Section 102.01B, Footnote (E) of the Manual to provide that the Exchange would calculate the market value of such company's shares using a price per share equal to the lowest price of the disclosed price range, minus an amount equal to 20% of the highest price included in such price range, which would be referred to as the "Primary Direct Floor Listing Minimum Price."⁵⁹ The Exchange also proposes to amend Section 102.01B, Footnote (E) to include the requirement, as discussed above, that a company listing its securities on the Exchange pursuant to a Primary Direct Floor Listing must have specified the quantity of shares registered, as permitted by Securities Act Rule

⁵⁷ See Section 102.01B of the Manual.

⁵⁸ See Section 102.01B, Footnote (E) of the Manual.

⁵⁹ See Notice, supra note 10, 87 FR at 68563.

457, in its effective registration statement and retained an underwriter with respect to the primary sales of shares by the company and identified the underwriter in its effective registration statement.⁶⁰

The Exchange states that, to implement the changes to the Price Range Limitation described above, the Exchange is proposing the following changes to Rules 7.31 and 7.35A.⁶¹ The Exchange proposes to modify Rule 7.31(c)(1)(D)(ii) to provide that the limit price of an IDO Order would be equal to the lowest price of the Primary Direct Floor Listing Auction Price Range and to redefine the “Primary Direct Floor Listing Auction Price Range” as 20% below the lowest price and 80% above the highest price of the disclosed price range.⁶² The Exchange also proposes to define “Issuer Price Range” as the price range established by the issuer in its effective registration statement.⁶³ The Exchange states that Rule 7.31(c)(1)(D)(ii), as modified, would facilitate the proposed changes to the Price Range Limitation by providing that the limit price of an IDO Order would be equal to the price that is 20% below the lowest price of the Issuer Price Range.⁶⁴ The Exchange further proposes to specify in Rule 7.31(c)(D)(ii) that, for purposes of determining the Primary Direct Floor Listing Auction Price Range, the 20% and 80% thresholds would be calculated based on the highest price of the Issuer Price Range.⁶⁵

⁶⁰ See id.

⁶¹ See id.

⁶² See id.

⁶³ See id.

⁶⁴ See id. The Exchange further proposes to specify in Rule 7.31(c)(1)(D)(ii) that, for purposes of determining the Primary Direct Floor Listing Auction Price Range, the 20% and 80% thresholds would be calculated based on the highest price of the disclosed price range, consistent with the Instruction to paragraph (a) of Securities Act Rule 430A. See id.

⁶⁵ See supra note 22.

Currently, Rule 7.35A(d)(2)(A)(v) provides that, for a security that is a Primary Direct Floor Listing, the Indication Reference Price will be the lowest price of the Primary Direct Floor Listing Auction Price Range.⁶⁶ The Exchange proposes to add the requirement that the Exchange disseminate the Indication Reference Price on a public website to Rule 7.35A(d)(2)(A)(v).⁶⁷ The Exchange also states that, based on the proposed revision to the definition of Primary Direct Floor Listing Auction Price Range in Rule 7.31(c)(1)(D)(ii), the Indication Reference Price for a Primary Direct Floor Listing would be the price that is 20% below the lowest price of the Issuer Price Range, consistent with the proposed changes to the Price Range Limitation.⁶⁸

Currently, Rule 7.35A(g)(2) specifies the circumstances under which a DMM may not conduct a Direct Listing Auction for a Primary Direct Floor Listing.⁶⁹ The Exchange proposes to amend Rule 7.35A(g)(2) such that the rule would specify requirements for a Direct Listing Auction for a Primary Direct Floor Listing to proceed, rather than specifying circumstances under which a DMM would not conduct a Direct Listing Auction for a Primary Direct Floor Listing.⁷⁰ The Exchange proposes to modify this rule to specify that the Auction Price for a Direct Listing Auction for a Primary Direct Floor Listing may not be lower than the price that is 20% below the lowest price of the Issuer Price Range or higher than the 80% Upper Limit.⁷¹ In other words, the Auction Price may not be outside of the Primary Direct Floor Listing Auction

⁶⁶ See Notice, supra note 10, 87 FR at 68563.

⁶⁷ See id.

⁶⁸ See id.

⁶⁹ See id.

⁷⁰ See id.

⁷¹ See id.

Price Range, as defined in amended Rule 7.31(c)(1)(D)(ii).⁷² The Exchange proposes that Rule 7.35A(g)(2)(A) would further provide that, if an issuer has certified to the Exchange a maximum Auction Price that is lower than the 80% Upper Limit, the Auction Price may not exceed such lower certified price.⁷³

The Exchange proposes to amend Rule 7.35A(g)(2)(B) to provide that a Direct Listing Auction could proceed when the Auction Price is outside of the Issuer Price Range but within the Primary Direct Floor Listing Auction Price Range (as described in proposed Rule 7.35A(g)(2)(A)) if the issuer has previously certified to the Exchange and publicly disclosed that: (a) the issuer does not expect that the Auction Price would materially change its previous disclosure in its effective registration statement (proposed Rule 7.35A(g)(2)(B)(i)(a)); (b) the price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K (proposed Rule 7.35A(g)(2)(B)(i)(b)); and (c) the registration statement contains a sensitivity analysis explaining how the issuer's plans would change if the actual proceeds from the offering differ from the amount assumed in the price range established by the issuer in its effective registration statement (proposed Rule 7.35A(g)(2)(B)(i)(c)).⁷⁴

The Exchange states that proposed Rule 7.35A(g)(2)(B)(ii) would further provide that, when the Auction Price determined by the DMM is outside of the Issuer Price Range (whether lower or higher), the issuer would be required to confirm to the Exchange that no additional

⁷² See id.

⁷³ See id.

⁷⁴ See id. at 68564.

disclosures are required under the federal securities laws based on such price.⁷⁵ According to the Exchange, this proposed change would permit issuers to comply with their disclosure obligations under federal securities laws and provide investors with access to the requisite disclosures before the offering would proceed.⁷⁶ The Exchange states that, upon receiving confirmation from the issuer that any such obligations have been met, the Exchange would relay that information to the DMM to proceed with the Direct Listing Auction.⁷⁷

The Exchange states that proposed Rule 7.35A(g)(2)(C)(i) would reflect the requirement set forth in current Rule 7.35A(g)(2)(B) that the DMM may not conduct a Direct Listing Auction for a Primary Direct Floor Listing if there is insufficient buy interest to satisfy both the IDO Order and all better-priced sell orders in full.⁷⁸ The Exchange does not propose to change this requirement, other than adding clarifying text to specify that such orders would be satisfied at the Auction Price.⁷⁹

The Exchange states that proposed Rule 7.35A(g)(2)(C)(ii) would provide that the DMM would not proceed with a Direct Listing Auction for a Primary Direct Floor Listing until it has been notified by the Exchange that the additional conditions set forth in new Commentary .20 to Rule 7.35A have been satisfied.⁸⁰ The Exchange also states that proposed Commentary .20 to Rule 7.35A would provide that the Direct Listing Auction for a Primary Direct Floor Listing for

⁷⁵ See id.

⁷⁶ See id. As stated above, the Exchange also notes that the burden of complying with the disclosures required under the federal securities laws, including providing any disclosure necessary to avoid any material misstatements or omission, remains with the issuer. See Notice, supra note 10, 87 FR at 68561.

⁷⁷ See id.

⁷⁸ See id.

⁷⁹ See id.

⁸⁰ See id.

a security may not be conducted until the Exchange has notified the DMM that, at least one business day prior to the commencement of trading in such security, the Exchange has distributed a regulatory bulletin describing: (i) any special characteristics of the offering and the Exchange rules that apply to the pricing of the Primary Direct Floor Listing; (ii) the obligations of member organizations pursuant to Exchange Rules 2090 and 2111; and (iii) the requirement that a member organization provide its customers with a notice with information regarding the Direct Listing Auction for a Primary Direct Floor Listing.⁸¹ The Exchange states that this proposed change would: (i) facilitate the requirements described above to provide member organizations with sufficient information so that they may in turn inform their customers; (ii) remind member organizations of their obligations to “know their customers”; (iii) increase transparency around the pricing mechanisms of a Primary Direct Floor Listing; and (iv) help provide investors with sufficient price discovery information.⁸²

Finally, the Exchange states that proposed Rule 7.35A(g)(2)(C)(iii) would provide that the DMM would not conduct a Direct Listing Auction for a Primary Direct Floor Listing if the Auction Price is outside of the Issuer Price Range and the issuer has not satisfied the conditions set forth in proposed Rules 7.35A(g)(2)(A) and 7.35A(g)(2)(B)(i) and (ii).⁸³ The Exchange states that it proposes this rule to reinforce that a Direct Listing Auction for a Primary Direct Floor Listing could not proceed in these circumstances unless the issuer has made the requisite disclosures described in proposed Rule 7.35A(g)(2)(B).⁸⁴

⁸¹ See id. See also supra notes 52-53 and accompanying text.

⁸² See Notice, supra note 10, 87 FR at 68564.

⁸³ See id.

⁸⁴ See id.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.⁸⁵ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Exchange Act,⁸⁶ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission has consistently recognized the importance and significance of national securities exchange listing standards. Among other things, such listing standards help ensure that exchange-listed companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.⁸⁷

⁸⁵ 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁸⁶ 15 U.S.C. 78f(b)(5).

⁸⁷ The Commission has stated in approving national securities exchange listing requirements that the development and enforcement of adequate standards governing the listing of securities on an exchange is an activity of critical importance to the financial markets and the investing public. In addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity so that fair and orderly markets can be maintained. See, e.g., Approval Order, supra note 11, 85 FR 85807, 85811 n.55 (Dec. 29, 2020) (SR-NYSE-2019-67) ("NYSE 2020 Order"); 82627 (Feb. 2, 2018), 83 FR 5650, 5653 n.53 (Feb. 8, 2018) (SR-NYSE-2017-30) ("NYSE 2018 Order"); 81856 (Oct. 11, 2017), 82

The Exchange's listing standards currently provide the Exchange with discretion to list a company whose stock has not been previously registered under the Exchange Act, where such company is listing in connection with a Primary Direct Floor Listing, without a firm commitment underwritten offering, either selling shares to raise capital alone or in conjunction with shares by selling shareholders.⁸⁸ The Exchange proposes to modify its rules concerning pricing limitations for securities listing on the Exchange pursuant to a Primary Direct Floor Listing. Instead of the current Price Range Limitation, which limits the Auction Price to the price range disclosed in the issuer's effective registration statement,⁸⁹ the proposal would allow the Direct Listing Auction for a Primary Direct Floor Listing to proceed at a price up to either 20% below or 80% above the disclosed price range if certain additional conditions are met. The Exchange also proposes changes to the procedures for a Direct Listing Auction for a Primary Direct Floor Listing to accommodate the proposed changes to the Price Range Limitation.

FR 48296, 48298 (Oct. 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission has stated that adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Exchange Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. See, e.g., NYSE 2020 Order, 85 FR at 85811 n.55; NYSE 2018 Order, 83 FR at 5653 n.53; Securities Exchange Act Release Nos. 87648 (Dec. 3, 2019), 84 FR 67308, 67314 n.42 (Dec. 9, 2019) (SR-NASDAQ-2019-059); 88716 (Apr. 21, 2020), 85 FR 23393, 23395 n.22 (Apr. 27, 2020) (SR-NASDAQ-2020-001).

⁸⁸ See Section 102.01B, Footnote (E) of the Manual and supra note 12. See also Approval Order, supra note 11, 85 FR 85807. The listing standards under Section 102.01B, Footnote (E) of the Manual also allow for direct listings in connection with the sale of shares by selling shareholders only.

⁸⁹ See Rule 7.31(c)(1)(D)(ii). The Commission previously approved the Exchange's proposal to allow Primary Direct Floor Listings as long as the Direct Listing Auction occurred within the Price Range Limitation. See Approval Order, supra note 12.

As explained further below, the following aspects of the proposal, as modified by Amendment No. 2, demonstrate that the Exchange's proposal is consistent with the protection of investors and the public interest under Section 6(b)(5) of the Exchange Act as well as the maintenance of fair and orderly markets: (i) by modifying the Price Range Limitation such that, provided other requirements are satisfied, a Primary Direct Floor Listing can be executed in the Direct Listing Auction at a price that is above the highest price of the disclosed price range only if the Auction Price is at or below the 80% Upside Limit; (ii) by adding conditions that must be satisfied before the Direct Listing Auction could proceed at a price outside of the disclosed price range that provide some assurance that issuers are complying with the disclosure requirements under federal securities laws, including conditions that require an issuer to provide a prior certification to NYSE to include a sensitivity analysis in its registration statement and to also confirm that no additional disclosures are required under the federal securities laws to open the Direct Listing Auction at the Auction Price; (iii) by requiring that a company offering securities for sale in connection with a Primary Direct Floor Listing must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement; and (iv) by making clarifying changes regarding calculation of the 20% threshold below the disclosed price range and other clarifying changes.

The Commission discusses below the Exchange's proposed modifications to Primary Direct Floor Listing. First, the Commission addresses the modifications to the Price Range Limitation, and the certification process and other conditions, that would allow a Primary Direct Floor Listing to execute in the Direct Listing Auction at a price that is outside the disclosed price range (i.e., up to 20% below the lowest price in the disclosed price range or no higher than the 80% Upside Limit). Second, the Commission addresses the availability of pricing information to

investors during the course of a Direct Listing Auction. Third, the Commission addresses the Exchange's proposed requirement that a company offering securities for sale in connection with a Primary Direct Floor Listing must retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement and addresses concerns about Section 11 liability and how requiring an underwriter may mitigate such concerns. Finally, the Commission discusses additional clarifications to the proposal. As discussed throughout this order, the Commission concludes that the Exchange has met its burden to demonstrate that its proposal is consistent with the Exchange Act, and therefore finds the proposed rule change is consistent with the requirements of the Exchange Act.

A. Modification of Price Range Limitation and Required Certification

The Exchange proposes to modify its rules concerning pricing restrictions for the Direct Listing Auction for a Primary Direct Floor Listing. Provided that other requirements are satisfied, a Primary Direct Floor Listing will be able to be executed in the Direct Listing Auction at a price that is at or above the price that is as low as 20% below the lowest price in the disclosed price range, or at a price that is as high as 80% above the highest price of the disclosed price range (i.e., at or below the 80% Upside Limit).

In all such cases where the execution price would be outside of the disclosed price range, the company will be required to specify the quantity of shares registered in its registration statement, as permitted by Securities Act Rule 457, and that registration statement will be required to contain a sensitivity analysis explaining how the company's plans would change if the actual proceeds from the offering are less than or exceed the amount assumed in the disclosed price range. Prior to the Direct Listing Auction, the company must certify to NYSE that the

registration statement contains the required sensitivity analysis.⁹⁰ The company will also be required to publicly disclose and certify to NYSE that the company does not expect that such offering price would materially change the company's previous disclosure in its effective registration statement and that the price range in the preliminary prospectus included in the effective registration statement is a bona fide price range in accordance with Item 501(b)(3) of Regulation S-K. If the company's certification submitted to NYSE in that regard includes a price limit that is below the 80% Upside Limit, NYSE will not execute the Direct Listing Auction if it results in an Auction Price above such limit.

The Exchange also proposes to require that the securities of a company listing in connection with a Primary Direct Floor Listing cannot price above the 80% Upside Limit (i.e., at a price that is more than 80% above the highest price of the disclosed price range). The Exchange believes this will incentivize the company and its named underwriter to take steps to help ensure the accuracy of the disclosed price range so as to avoid the consequences of a failed offering. In the OIP, the Commission asked questions about the potential usefulness and reliability of the price range disclosure in the registration statement if issuers could price up to 20% below and anywhere above the disclosed price range.⁹¹ The changes that the Exchange made subsequent to the OIP, including the imposition of the 80% Upside Limit and the named underwriter requirement, is a reasonable response to address these concerns, and eliminates the open-ended nature of the original proposal that would have allowed the opening to occur at any price above the high end of the disclosed price range, with no limitations.

⁹⁰ As the Exchange states, the sensitivity analysis would allow investors to see how changes in the share price ripple through critical elements of a company's disclosure.

⁹¹ See OIP, supra note 7. One commenter raised similar concerns. See Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors (July 28, 2022) ("CII Letter I").

The Exchange's proposal to expand the Price Range Limitation for Primary Direct Floor Listing would not allow the Direct Listing Auction to proceed at a price outside of the disclosed price range if the company is unable to provide NYSE with the required certification about the adequacy of the disclosure to allow the offering to execute at a price that is up to 20% below the low end of the disclosed price range or is up to the 80% Upside Limit. In addition, the Direct Listing Auction could not proceed at a price outside of the disclosed price range if the company is unable to confirm to the Exchange that no additional disclosures are required under the federal securities laws to open the Direct Listing Auction at the Auction Price. The DMM would not conduct a Direct Listing Auction for a Primary Direct Floor Listing if, among other things, the Auction Price would be outside the disclosed price range and the company has not satisfied the conditions described above. We believe these provisions, taken together, will provide an opportunity for the company to meet its disclosure obligations under the federal securities laws prior to the opening auction on the NYSE proceeding if the Direct Listing Auction for a Primary Direct Floor Listing will execute at a price that is up to 20% below the low end of the disclosed price range or is up to the 80% Upside Limit. Issuers also must comply with separate disclosure obligations under the federal securities laws, and compliance with the specific requirements of NYSE's proposed listing standards may not be sufficient to comply with the federal securities laws. In particular, an issuer using Rule 430A to omit pricing-related information would need to consider whether a post-effective amendment to a registration statement containing a price range would be required if a change in price materially alters the disclosure in the registration statement at effectiveness. In addition, for purposes of Securities Act Sections 12(a)(2) and 17(a)(2), information delivered to purchasers after the time of sale is not taken into account in

determining whether there were material misstatements or omissions.⁹² The Commission has interpreted Section 12(a)(2) and Section 17(a)(2) as reflecting a core concept of the Securities Act—that materially accurate and complete information regarding an issuer and the securities being sold should be available to investors at the time of the contract of sale, when they make their investment decisions.⁹³ Based on the above, the Commission believes that this aspect of the proposal is consistent with the investor protection and public interest provisions under Section 6(b)(5) of the Exchange Act.⁹⁴

B. Availability of Pricing Information

In the OIP, the Commission asked whether providing pricing information during the course of the auction process only through pre-opening indications via data feeds that charge subscription fees would be consistent with, as stated by the Exchange, “providing readily available, real time pricing information to investors.”⁹⁵ The Exchange stated in response that its dissemination of pre-opening indications for a security to be opened in a Direct Listing Auction for a Primary Direct Floor Listing via the SIP and proprietary data feeds is consistent with the availability of the same for securities opened in IPOs and the Exchange believes that interested investors have found pre-opening indications to be readily accessible and to provide useful real

⁹² See Securities Act Rule 159. See also Securities Exchange Act Release No. 93119 (Sept. 23, 2021), 86 FR 54262, 54266 n.47 (Sept. 30, 2021).

⁹³ See Securities Offering Reform Proposing Release, Securities Act Release No. 8501 (Nov. 3, 2004) (proposing current Rule 159 as an interpretation of Section 12(a)(2) and Section 17(a)(2)) and Securities Offering Reform Adopting Release, Securities Act Release No. 8591 (Aug. 3, 2005) (adopting Rule 159 as proposed).

⁹⁴ See OIP, supra note 7.

⁹⁵ See OIP, supra note 7.

time pricing information to inform their participation in such auctions.⁹⁶ In its proposal, the Exchange also stated that by providing real time pricing information by disseminating pre-opening indications, as stated above, market participants would have ready access to up-to-date pricing information leading up to the Direct Listing Auction for a Primary Direct Floor Listing and this should support price discovery transparency to investors.⁹⁷ The Exchange further stated that, under the proposal, member organizations would be required to provide to a customer, before that customer places an order to participate in a Direct Listing Auction for a Primary Direct Floor Listing, a notice describing the mechanics of pricing a security subject to a Direct Listing Auction for a Primary Direct Floor Listing, including information regarding the availability of pre-opening indications via the SIP and proprietary data feeds and the location of the public website where the Exchange would disseminate information relating to the Indication Reference Price.⁹⁸ The Exchange also represented that it would issue a regulatory bulletin describing any special characteristics of the offering and the rules that apply to the pricing of the Primary Direct Floor Listing. Further, the Exchange represented that its regulatory bulletin would indicate the highest price at which the Direct Listing Auction for the Primary Direct Floor Listing could proceed.⁹⁹

⁹⁶ See Notice, supra note 10, 87 FR at 68562 n.29.

⁹⁷ See id. at 68565.

⁹⁸ See id. at 68562. The Exchange will also make the Indication Reference Price available, free of charge, on a public website (such as www.nyse.com) on the day the Direct Listing Auction is anticipated to take place. As stated above, this price is the lowest price of the Primary Direct Floor Listing Auction Price Range and would be known before the opening process begins and would not change once established.

⁹⁹ See id. The Exchange also represented that the regulatory bulletin would specify the price that is 20% below the lowest price of the disclosed price range. See id.

The Exchange has further stated that the pre-opening indications, based on the DMM's assessment of interest eligible to participate in the Direct Listing Auction, would provide notice of when "price volatility has subsided and price equilibrium has been met with respect to the orders wishing to participate in such Auction."¹⁰⁰ In particular, the Exchange highlighted three existing rules concerning pre-opening indication procedures: Exchange Rule 7.35A(d)(4)(C) provides that the DMM should aim to publish a pre-opening indication with a spread of less than \$1.00 before opening a security; Rule 7.35A(d)(4)(D) provides that the DMM must wait for certain minimum specified periods of time after publishing a pre-opening indication before opening a security;¹⁰¹ and Rule 7.35A(d)(4)(G) provides that the DMM may not open a security outside of the last-published pre-opening indication. These pre-opening indication procedures apply to Direct Listings, including Primary Direct Floor Listings, as well as other IPOs on the Exchange. Further, the Exchange has represented that the availability of pre-opening indications for Primary Direct Floor Listings are consistent with the availability of the same information for securities opened in IPOs on the Exchange.

The Commission believes that the availability of pre-opening indications, which must be provided in accordance with these existing procedures to investors in Primary Direct Floor Listings, could help to provide investors with useful information as to the pricing of the security in the Direct Listing Auction and help to inform investors in making decisions about entering, modifying, or cancelling orders to participate in such auction. The Commission also believes

¹⁰⁰ See *id.* at 68565.

¹⁰¹ A DMM must wait for a minimum of three minutes between publication of the first indication and a security's opening or reopening. If more than one indication has been published, a security may be opened or reopened one minute after the last published indication provided that at least three minutes have elapsed from the dissemination of the first indication. See NYSE Rule 7.35A(d)(4)(D).

that the 80% Upside Limit, or other lower maximum price based on the company's certification, will provide a cap to an investor's financial obligation on its buy order that would be executed in the opening auction and that the regulatory bulletin should help inform investors of this price.¹⁰² Based on the above, the Commission finds these procedures are consistent with the protection of investors, the public interest, and the other requirements of Section 6(b)(5) of the Exchange Act.

C. Addition of Named Underwriter Requirement in a Primary Direct Floor Listing and Securities Act Section 11 Standing

Given the broad definition of "underwriter" in the Securities Act,¹⁰³ parties, such as the issuers' financial advisor, may, depending on the facts and circumstances including the nature and extent of that party's activities, be deemed a statutory underwriter with respect to a direct listing, with attendant underwriter liabilities. In the OIP, the Commission asked several questions about potential issues related to the lack of a named underwriter (as opposed to a statutory underwriter) in a Primary Direct Floor Listing where an offering can price outside of the range established by the issuer in its effective registration statement.¹⁰⁴ The Commission questioned whether a party who may meet the statutory underwriter definition but is not named

¹⁰² But see discussion in Section III A, supra, concerning an issuer's disclosure obligations with respect to pricing and pricing changes.

¹⁰³ Section 2(a)(11) of the Securities Act defines "underwriter" to mean "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking."

¹⁰⁴ See OIP, supra note 7. One commenter stated it was concerned, consistent with the statements in the OIP, about the lack of a named underwriter in a Primary Direct Floor Listing where the offering could price outside of the range established by the issuer in its effective registration statement and stated it also had concerns about challenges to bringing claims under Section 11 of the Securities Act due to potential tracing issues. See CII Letter I, at 4.

as an underwriter would review and adequately conduct due diligence on the information contained in the registration statement for a Primary Direct Floor Listing where the Direct Listing Auction is executed outside of the disclosed price range. The Commission also stated that permitting a Primary Direct Floor Listing could potentially result in increased regulatory arbitrage if and to the extent that issuers and intermediaries, including financial advisors, are not subject to equivalent liability standards in the direct listings context as they would be in traditional firm commitment underwritten IPOs.¹⁰⁵

In the proposed rule change as modified by Amendment No. 2, the Exchange proposes to require that a company offering securities for sale in connection with a Primary Direct Floor Listing retain an underwriter with respect to the primary sales of shares by the company and identify the underwriter in its effective registration statement.¹⁰⁶ The Exchange states that it believes that underwriters provide significant investor protections that are necessary in a Primary Direct Floor Listing where an offering can price outside of the range established by the issuer in its effective registration statement.¹⁰⁷ For example, the Exchange states that underwriters are exposed to potential Securities Act liability, which provides a strong incentive for them to take steps to help ensure the accuracy of disclosure in a registration statement.¹⁰⁸ The Exchange states that it “believes that these significant investor protection provisions are necessary in a Primary Direct Floor Listing if an offering can price outside the price range established in the issuer’s effective registration statement, subject to the proposed limitations, because such

¹⁰⁵ See OIP, supra note 7.

¹⁰⁶ See Notice, supra note 10, 87 FR at 68559.

¹⁰⁷ See id. at 68561.

¹⁰⁸ See id.

provisions allow investors to make reasonable pricing decisions with clarity that the company’s underwriter would face statutory liability.”¹⁰⁹ Earlier in the amended proposal, the Exchange notes the Commission’s recent explanation that “[t]he civil liability provisions of the Securities Act reflect the unique position underwriters occupy in the chain of distribution of securities and provide strong incentives for underwriters to take steps to help ensure the accuracy of disclosure in a registration statement.”¹¹⁰ Accordingly, the Exchange proposes to require named underwriters for listings of securities on the Exchange in connection with a Primary Direct Floor Listing.

The Commission believes that the Exchange’s proposed requirement that a company conducting a Primary Direct Floor Listing must retain and name an underwriter will help address the investor protection concerns discussed in the OIP that can arise in a Primary Direct Floor Listing that prices outside of the disclosed price range. With respect to disclosure, for example, for an offering to proceed at a price outside of the disclosed price range, the Exchange’s proposal would require the company to initially provide certifications to the Exchange and publicly disclose that the company does not expect that such a price would materially change its effective registration statement disclosure. The company’s registration statement also would need to contain a sensitivity analysis explaining how the company’s plans would change if the actual proceeds from the offering are less than or exceed the amount assumed in the disclosed price range. In addition, the company would be required to confirm to the Exchange that no additional disclosures are required under the federal securities laws based on the actual price. The required

¹⁰⁹ See id. at 68561.

¹¹⁰ See id. (quoting Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Exchange Act Release No. 94546 (Mar. 30, 2022), 87 FR 29458 (May 13, 2022)).

presence of named underwriters who are subject to Securities Act liability should help ensure the accuracy of these disclosures that potential investors receive in a Primary Direct Floor Listing. This disclosure includes information, such as the use of proceeds and the required sensitivity analysis, that becomes even more important when an offering prices outside of the range established by the company in its registration statement. Investors should also benefit from the knowledge that underwriters with Securities Act liability are required as companies consider the certifications they must provide to the Exchange with respect to the impact of price changes on their registration statement disclosure and on their obligation to provide additional disclosures under the federal securities laws.

The Commission also asked questions in the OIP about shareholders' ability to pursue claims under Section 11 of the Securities Act due to potential traceability issues.¹¹¹ The Exchange states that it believes that the requirement to retain a named underwriter in a Primary Direct Floor Listing may mitigate traceability concerns because the underwriter "would be able to impose lock-up arrangements for the same reasons that make lock-up agreements common in an IPO."¹¹² The Commission agrees that the requirement to retain a named underwriter may help

¹¹¹ See OIP, supra note 7. One commenter raised similar concerns. See CII Letter I and Letter from Jeffery P. Mahoney, General Counsel, Council of Institutional Investors (Dec. 1, 2022) ("CII Letter II"). This commenter also stated that the Exchange does not address how its proposal "might alleviate the poor corporate governance practices that appear endemic to companies that become public through a direct listing." CII Letter II. As the Commission stated previously, the Commission does not believe that investors will be precluded from raising concerns about governance structures in the context of direct listings; to the extent a company's corporate governance practices are of sufficient concern to investors, they may be able to influence companies' governance practices through signaling their unwillingness to purchase a company's shares through a direct listing. In this way, investors may be able to persuade companies to adopt preferred governance provisions, whether the company becomes listed through a direct listing or a firm commitment IPO. See Securities Exchange Act Release No. 91947 (May 19, 2021), 86 FR 28169, 28177 (May 25, 2021) (SR-NASDAQ-2020-057) ("Nasdaq 2021 Order").

¹¹² See Notice, supra note 10, 87 FR at 68561.

mitigate traceability concerns. However, the actual impact of the named underwriter requirement is far from certain, particularly because tracing is a judicially-developed doctrine and there is limited judicial precedent addressing tracing requirements in the context of direct listings. In addition, because of the many factors that go into an underwriter's decision to request or require lock-up arrangements in public offerings, whether, and if so to what extent, underwriters in Primary Direct Floor Listing would impose lock-up arrangements on all company shareholders is unclear. Although the Commission's findings in this order are based on the specific proposed rule change filed with the Commission, including how the proposed rule operates under the circumstances discussed in this order, the Commission recognizes that, over time, those circumstances may change. Some of the circumstances that may change involve tracing and may include developments in case law involving tracing in the direct listing context.

In view of the totality of the Exchange's proposal, including the requirement that a company seeking to conduct a Primary Direct Floor Listing retain and name an underwriter, the Commission does not expect any such tracing challenges in this context to be of such magnitude as to render the proposal inconsistent with the Exchange Act.¹¹³ The Commission therefore concludes that the proposed rule change, as modified by Amendment No. 2, is consistent with the protection of investors and the public interest under Section 6(b)(5) of the Exchange Act.

D. Additional Clarifications

In the OIP, the Commission asked questions about how the Exchange would calculate the 20% threshold below the disclosed price range under proposed Rule 7.31(c)(1)(D)(ii) and whether that computation would lead to the same minimum price contemplated by the proposed

¹¹³ See Approval Order, *supra* note 12, 85 FR at 85816. See also Nasdaq 2021 Order, *supra* note 111, 86 FR at 28176.

revisions to Section 102.01B, Footnote (E) of the Manual.¹¹⁴ Subsequently, the Exchange revised its proposal to provide that the 20% threshold below the disclosed price range, along with the 80% threshold used to determine the 80% Upper Limit, would be calculated using the highest price of the Issuer Price Range.¹¹⁵ In addition, the Exchange made clarifying changes to the description of the 20% threshold used for evaluating whether the company has satisfied the market value requirement in Section 102.01B, Footnote (E) of the Manual.¹¹⁶ The Commission finds that these changes will help ensure that the calculations are consistent throughout the Exchange's rules and set forth a clear process for how the Exchange will calculate the 20% and 80% thresholds, thereby providing clarity to investors and market participants on the lowest and highest price outside of the disclosed price range at which the Direct Listing Auction can occur consistent with the protection of investors and the public interest under Section 6(b)(5) of the Exchange Act.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.

¹¹⁴ See OIP, supra note 7.

¹¹⁵ See proposed Rule 7.31(c)(1)(D)(ii). See also Notice, supra note 10, 87 FR at 68563. Under the Exchange's original proposal, the 20% threshold would have been calculated based on the maximum offering price set forth in the registration fee table, consistent with the Instruction to paragraph (a) of the Securities Act.

¹¹⁶ See proposed Section 102.01B, Footnote (E) of the Manual. See also Notice, supra note 10, 87 FR at 68562.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,¹¹⁷ that the proposed rule change (SR-NYSE-2022-14), as modified by Amendment No. 2 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹⁸

Sherry R. Haywood,
Assistant Secretary.

¹¹⁷ Id.

¹¹⁸ 17 CFR 200.30-3(a)(12).